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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

HAROLD R. SMALL,
Attorney for Petitioner.

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Counsel for Petitioner.

LIST OF CASES CITED.

Page

Missouri Pacific R. R. v. Chicago, Rock Island and Pacific R. R. Co., 41 Fed. (2d) 190 (U. S. Court of Appeals, 8th Cir., certiorari denied, 282 U. S. 866). 3

Texas and Pacific R. R. Co. v. Gulf, Colorado and Santa Fe Railroad Co., 270 U. S. 266..... 3

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The propositions in the brief of respondent Missouri Pacific Railroad Company are:

> "The question whether the Missouri Pacific's proposed track is a spur track or an extension was not an issue" (Respondent's Brief, p. 4).
>
> "The right to a crossing cannot be questioned in this action" (Respondent's Brief, p. 8).

The Supreme Court of Arkansas in this case, however, holds the question of whether the proposed track was a spur track or an extension was an issue, its holding being:

> "After a careful reading and analysis of the evidence adduced in the instant case, the Court has concluded that the proposed improvement is a spur within the meaning of paragraph 22 and not an extension of the line of appellee's railroad within the meaning of section 18. The proposed improvement being a spur only, it was unnecessary to obtain a certificate of convenience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing.
>
> "The judgment of the Circuit Court is, therefore, affirmed" (Rec., p. 94).

The Supreme Court of Arkansas thus clearly holds that the proposed track was a spur, and not an extension.

The propositions, therefore, of respondent are not in accord with the holding of the Arkansas Supreme Court.

And, strange to say, in view of the foregoing propositions respondent in its brief at page 14 says it had the right "to cross petitioner's railroad with this *spur* track," etc., evidencing its contention the proposed track was a spur track.

The evidence in the record shows the track of respondent that was to cross the track of petitioner was an extension, as an extension is defined by this Court, and as

defined by the United States Court of Appeals for the Eighth Circuit.

No part of the track as a part of an extension could be lawfully constructed without the prior consent of the Interstate Commerce Commission.

The definition of an extension in Texas and Pacific R. R. Co. v. Gulf, Colorado and Santa Fe Railroad Co., 270 U. S. 266 (cited in our original brief at pages 5, 6 and 7), and in Missouri Pacific R. R. v. Chicago, Rock Island and Pacific R. R. Co., 41 Fed. (2d) 190 (U. S. Court of Appeals, 8th Cir., certiorari denied, 282 U. S. 866), defines, it is submitted, the track here in controversy to be an extension. The latter case is referred to in our original brief at pages 8 and 9. The Missouri Pacific in that case proposed to build a track 3,700 feet long in the same City of Little Rock, Arkansas, in a district served by the Rock Island, and the Circuit Court of Appeals decided that before it could build such track extension a certificate from the Interstate Commerce Commission was necessary.

Respondent proposes to duplicate facilities and service to the Dixie Cotton Oil Company in Little Rock, Arkansas, now furnished by petitioner, and the proposal is further to duplicate facilities and service now furnished by petitioner throughout that district, and in a manner so as to bar petitioner from its own territory (Rec., pp. 29-31).

The record shows that the proposed facilities amount to an extension (Rec., pp. 31-32).

The proposed track is to extend respondent's line substantially into territory not theretofore served by respondent, and now served adequately by petitioner (Rec., pp. 9-68, especially pp. 26-27 and 31-32).

It is submitted that the Arkansas Supreme Court erred in failing to follow the controlling federal constructions of an extension, as defined by this Court and as defined by other federal courts.

Respectfully submitted,

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By HAROLD R. SMALL,
Its Attorney.

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Of Counsel.